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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 914

PHILLIP MICHAEL SCHEMEL, - - Petitioner,

versus

GENERAL MOTORS CORPORATION, - Respondent.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA,
EVANSVILLE DIVISION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

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October Term, 1967

No. _____

PHILLIP MICHAEL SCHEMEL, - - *Petitioner,*

v.

GENERAL MOTORS CORPORATION, - - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner prays that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Seventh Circuit, dated and entered in this case on July 17, 1967, with the petition for rehearing and rehearing en banc being denied on September 20, 1967.

CITATIONS TO OPINIONS BELOW.

The opinion of the United States District Court for the Southern District of Indiana, Evansville Division, is printed in Appendix A, and is reported at 261

F. Supp. 134. The opinion of the United States Court of Appeals for the Seventh Circuit together with the concurring and dissenting opinion is printed in Appendix B, and is reported only at 11 Ind. Dec. 1 (1967).

JURISDICTION.

The Judgment of the Court of Appeals was entered on July 17, 1967. On August 1, 1967, petitioner filed a timely petition for extension of time within which to file a petition for rehearing, and on August 2, 1967, the respondent filed an objection to petitioner's petition for extension of time. On August 5, 1967, petitioner filed a motion to amend his petition for extension of time, and on August 10, 1967, the Court of Appeals extended the time for filing petitioner's petition for rehearing to and including August 15, 1967. On August 15, 1967, petitioner filed a petition for rehearing and for rehearing en banc, and on August 21, 1967, respondent filed a petition for an extension of time within which to answer petitioner's said petition and the Court of Appeals granted respondent to and including September 11, 1967, within which to file its answer. On September 11, 1967, respondent filed its answer, and on September 20, 1967, the Court of Appeals denied both petitioner's petition for rehearing and for rehearing en banc.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED.

1. Whether under Indiana law the manufacturer of an automobile has the duty of exercising reasonable care in designing, manufacturing, selling, and distributing its automobiles so as to not create an unreasonable risk of serious personal injury to innocent bystanders who are to be endangered by the foreseeable use of its automobiles.

2. Whether petitioner's complaint states a claim for relief under Indiana law on the theory of negligence against the manufacturer of an automobile designed and advertised to be driven at excessive and unlawful rates of speed.

3. Whether petitioner's right to trial by jury as guaranteed by the Indiana Constitution was denied by the dismissal of his claim where it does not appear beyond a doubt that the petitioner cannot prove any set of facts in support of his claim which would entitle him to relief.

4. Whether petitioner's right to trial by jury as guaranteed by the Indiana Constitution was denied by the Court's determining factual issues and by failing to submit factual issues to a jury for determination.

STATEMENT OF THE CASE.

This action was brought to recover damages for the personal injuries sustained by the petitioner while riding as a passenger in an automobile which was struck from the rear by a 1960 Chevrolet Impala automobile manufactured by the respondent and operated at the

time of the collision by one Michael N. Bigham at a speed of approximately 115 m.p.h. Jurisdiction of the district court was invoked because of the diversity of citizenship.

Petitioner charges respondent with negligence in designing the Chevrolet automobile with a capacity for speeds far exceeding any legal or reasonable limit and inducing Bigham's use of that capacity by emphasizing speed in its advertising.

It is alleged that respondent knew that there was no useful purpose in manufacturing and selling automobiles that ordinary consumers could drive at such excessive and unlawful speeds when the roads and highways in the United States were not designed for and were not suitable for use by automobiles at speeds in excess of 100 m.p.h., when very few, if any, operators were capable of driving safely at speeds in excess of 100 m.p.h., and when the laws of each of the states contemplate maximum speeds of from 60 to 80 m.p.h.

Petitioner alleges that the respondent should have foreseen that its automobile would in fact be driven by someone at excessive and unlawful speeds to the risk of the public in general and in particular to innocent bystanders such as the petitioner, and that the respondent could and should have designed its automobile so that it could not travel at such excessive and unlawful speeds, but negligently failed to do so, and actually encouraged irresponsible persons to exceed lawful and reasonable speed limits by its advertising.

The respondent's motion to dismiss petitioner's action for failure to state a claim upon which relief

may be granted was sustained. The United States Court of Appeals for the Seventh Circuit affirmed with Judge Kiley vigorously dissenting. The petition for rehearing en banc was denied; however, Judges Schackenberg, Kiley, Swygert and Fairchild each voted to grant the petition for rehearing en banc.

REASONS FOR GRANTING THE WRIT.

1. The Majority Opinion of the Court of Appeals Erroneously Decides a Question of Great National Significance.

President Lyndon B. Johnson, in a White House Press Release on February 2, 1966, stated:

> "You and I know that the gravest problem before this nation—next to the war in Viet Nam—is the death and destruction, the shocking and senseless carnage, that strikes daily on our highways and that takes a higher and more terrible toll each year."

Judge Kiley's dissenting opinion quotes statistics published by the National Safety Council which indicate that "excess speed" is the leading factor in urban and rural fatal accidents and in rural injury causing accidents.

In a press release of August 13, 1967, William Haddon, Jr., Director of the National Highway Safety Agency, said:

> "We would like to see cars built so that they cannot exceed a certain speed, say, for example, 80 miles an hour, . . . Speed is important, particularly in certain kinds of accidents, the most

> common involves the teenager or college-age kids out joy riding, perhaps in a stolen car, often in a police chase . . . The speeds in these often get up to 100, 110, 120 even higher and frequently kill not only themselves but innocent parties."

This Court now has the opportunity of doing more to solve the problem of excessive speed than all of the traffic courts, police officers, and legislative bodies put together have been able to do to date because the long arm of the law now has its grip upon the source of the trouble. If the petitioner is given the opportunity to and is able to prove the allegations contained in his complaint, the respondent, and the other automobile manufacturers, will be forced to either stop designing their automobiles with such unreasonable speed capacity and emphasizing that speed capacity in their advertising, or pay damages to the people who can prove that such conduct proximately caused them damages. In either event, our nation will benefit because either the highways will become much safer or the victims will have solvent defendants to look to for compensation, not as an insurer, but as a wrongdoer, when the victim has *proven* the *wrongdoing* was a *proximate cause* of his damages.

The losses caused by unreasonably and unnecessarily dangerous automobiles should be placed on those who have created the risk and reaped the profits, rather than on innocent bystanders.

If the majority opinion of the Court of Appeals is not reversed, this Court will not only have missed the opportunity of taking the greatest step forward in

promoting automobile safety, but also this Court will have actually sanctioned the respondent's conduct and provided the automobile manufacturers with a legal precedent authorizing them to continue selling automobiles such as the respondent's "Corvette" which has had speedometers registering 160 m.p.h., and Ford's "Thunderbird" which has had speedometers registering 150 m.p.h. In fact, what would prevent the automobile manufacturers from building, advertising, and selling automobiles capable of traveling in excess of those speeds?

As excess speed not only causes so many accidents but also frequently kills or seriously injures innocent bystanders, there are very few cases where the decision has such national significance and is so deserving of consideration by this Court as this case. The fact that the Court of Appeals split with four judges voting for and four judges voting against granting the petition for rehearing en banc is an indication that this case deserves the consideration of this Court.

2. The Majority Opinion of the Court of Appeals Conflicts With Decisions of the Indiana Supreme and Appellate Courts.

The respondent's motion to dismiss and both of the lower Courts' opinions are based solely upon the premise that the respondent owed no duty to the petitioner. Whether a duty was owed by the respondent to the petitioner is determined by the substantive law of Indiana. *Erie R. Co.* v. *Thompkins,* 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

(A) RESPONDENT'S DUTY WAS TO USE REASONABLE CARE.

Union Traction Company v. *Berry,* 188 Ind. 514, 121 N.E. 655 (1919), clearly defines the role of the court and jury so far as duty is concerned, and because the respondent is relying so heavily upon this decision, the following portion of the opinion, beginning at page 520 of the official report, is extensively quoted, to-wit:

> "The duty to exercise care for the safety of another arises as a matter of law out of some relation existing between the parties, and it is the province of the court to determine whether such a relation is shown as gives rise to such duty. In determining whether the relation shown gives rise to a duty to use care, the court decides a pure question of law. This question cannot be submitted to a jury. Where a duty to exercise care exists, it is always the same regardless of the nature of the relation out of which it arises. It cannot be said that the duty to use care which arises out of the relation of carrier and passenger differs in kind, character, or degree from the duty which arises out of the relation of master and servant, or out of any other relation which imposes the legal duty to use care.
>
> "In submitting the determination to a jury of a question of negligence, which is a mixed question of law and fact, the court is required to define the duty which the law imposes. This duty is defined by the law as 'due care,' 'ordinary care,' or 'reasonable care,' which terms are regarded by the courts as having the same significance. It is also the duty of the court to state the rule fixing

the standard of care which will measure up to the duty imposed by law. The court should then leave it to the jury to decide whether the acts and conduct of the defendant in respect to the matter before the court measures up to the standard of care fixed by the law. *In defining the duty and fixing the standard of care by which the jury is to measure the conduct of the defendant, the court does not consider the facts of the particular case.* The duty is the same under all relations, and the standard of care which will measure up to the duty in all cases is such care as a person of reasonable or ordinary prudence would exercise in view of all the conditions and circumstances as disclosed by the evidence in the particular case. *It is for the jury to consider the conditions and circumstances disclosed by the evidence in determining what action should have been taken or avoided, what precautions should have been employed, and what course of conduct should have been pursued in order to measure up to the duty of 'due care' which the law imposes.* In determining this fact the jury applies the standard furnished by the court, which is, What would a person of ordinary prudence have regarded as reasonably necessary or proper under the circumstances shown?" (Our emphasis)

Union Traction Company v. *Berry,* 188 Ind. 514, 121 N.E. 655 (1919), clearly holds that the only question for the court to decide with respect to duty is the relationship between the parties. Once the duty to use care is established, the court must leave to the jury the question of whether the conduct of the defendant measured up to reasonable care.

Belt, etc. Co. v. *McLain,* 58 Ind. App. 171, 106 N.E. 742 (1914), also emphasizes that duty arises from the relationship of the parties. At page 176 of the official report, the court said:

> "Where an act is alleged to have been negligently done or negligently omitted, the conditions and circumstances under which it was done or omitted are not necessary in a pleading for the reason that it is not the province of the court to judge from such conditions and circumstances whether ordinary care required the act to be done or omitted. That is the peculiar province of the jury. The duty to use care in favor of appellee being shown, it is sufficient to charge that the acts or omissions specified were negligently done or omitted. The general duty to use care in favor of the plaintiff which arises as a matter of law from the relation between the parties as shown by the complaint is broad enough and comprehensive enough to include every specific act that ordinary care requires in the discharge of such duty. When the general duty to use care is shown an allegation that ordinary care required the performance of a particular act is sufficient to bring such act within the scope of the general duty imposed by law."

On a motion to dismiss, the court should assume the truth of all the allegations in the complaint and the complaint should not be dismissed unless it appears beyond doubt that the plaintiff cannot prove any set of facts in support of his claim which would entitle him to relief. *Conley* v. *Gibson,* 335 U.S. 41, 78 S. Ct. 99, 2 L. Ed.2d 80 (1957).

The petitioner's complaint alleges that an automobile that was negligently designed, manufactured, sold and distributed by the respondent was traveling at a speed of approximately 110 m.p.h. at the time it crashed into the rear-end of an automobile in which the petitioner was riding at a speed of approximately 55 m.p.h. The relationship of the parties is clear. The petitioner was an innocent bystander who was injured by one of the respondent's products.

If the Indiana law, as set forth in *Union Traction Company* v. *Berry,* 188 Ind. 514, 121 N.E. 655 (1919), and *Belt, etc. Co.* v. *McLain,* 58 Ind. App. 171, 106 N.E. 742 (1914), is followed, this court will not concern itself with the particular facts of this case other than to determine whether the relationship of the parties was such that the respondent was under a duty to use reasonable care to avoid injuring the petitioner.

The application of a different method for determining the manufacturer's duty by the Court of Appeals in this case creates a conflict between the result that could be expected in an Indiana court and the result obtained in this diversity proceeding.

(B) THE *EVANS* CASE IS NEITHER APPLICABLE NOR CORRECT.

The case of *Evans* v. *General Motors Corp.,* 359 F.2d 822 (7th Cir. 1966) *cert. den.* 385 U.S. 836 (1966), which the majority regarded as dispositive of this case, is clearly distinguishable from the case at bar for the reasons set out in the dissenting opinion of Judge Kiley.

In any event, the *Evans* case has been sharply criticized by the legal writers. In addition to the critical articles listed in footnote 6 of Judge Kiley's dissent, an article entitled, "Symptoms and Decisions" has appeared on page 29 of the June-July issue of Trial. Its author, Professor Jack L. Kroner of New York University Law School, in criticizing the *Evans* case, said:

> "The majority position that the court cannot define the liability of an automobile manufacturer so as to embrace the type of risk at issue in *Evans* is, of course, utterly untenable. Courts define duty in these cases every day, except of course where, as here, they fear the economic impact of their decisions and talk instead of 'legislative function'."

It should be noted that, except for his brief discussion of the negligent advertising, Judge Cummings gave no reason to concur with Judge Knoch except that he felt bound by the *Evans* case.

It is ironic that the majority in both the *Evans* case and the case at bar cited *Union Traction Co. of Indiana* v. *Berry,* 188 Ind. 514, 121 N.E. 655 (1919), as authority for their decision because that is the case which, if followed, would require the opposite result in both cases.

(C) LAWFULNESS OF USE IS NOT THE TEST.

The majority opinion of the Court of Appeals in its discussion of the Restatement of Torts, Second, has attached unwarranted significance to the words, "lawful use," as they appear in Section 395.

Section 395 must be read in conjunction with Sections 302, 302A and 302B as well as comment j to Section 395. It is true that Section 395 imposes liability for physical harm caused by the "lawful use" of a product, however, Sections 302, 302A, and 302B impose liability for injuries proximately caused by the original actor through the foreseeable actions of third persons, whether those actions are negligent, reckless or criminal.

Irrespective of what the Restatement says on this particular point, Indiana has always held that where harmful consequences are brought about by intervening and independent forces, the operation of which might have been reasonably foreseen, the original wrongdoer may be held liable regardless of whether the intervening act was a negligent or criminal act.

In *Binford* v. *Johnston,* 82 Ind. 426 (1882), the defendant negligently sold cartridges to two minors. The younger brother of one of the two minors obtained the cartridges and shot his brother. The seller was held liable. In *Smith* v. *Thomas, et al.,* 126 Ind. App. 59, 130 N.E.2d 85 (1955), the defendants, who furnished an automobile to a minor, were held liable to an innocent bystander whose truck was damaged as the result of the negligent operation of the automobile by the minor who was also unlawfully driving without a license.

The Indiana Appellate Court in *S. I. G. & E. Co.* v. *Caine,* 136 Ind. App. 379, 198 N.E.2d 14 (1964), held that the violation of a criminal statute by a person

wrongfully turning on gas does not relieve the gas company from liability to an innocent bystander when the company was also negligent. At page 388 of the official report, the court said:

> "The asserted claim by appellant of its insulation from liability merely because a third party turned on the gas through the use of the valve, permitting the said gas to flow through the meter and into the customer's side of the distribution system, falls on deaf ears in view of the guiding principles of law in Indiana, as established by our courts."

and at page 389, the court said:

> "There is the further doctrine of foreseeability upon which the jury was entitled to pass, and evidently did pass, favorable to appellee; that under all the facts and circumstances as shown by the evidence, the appellant could reasonably foresee that some third party might do exactly what was done, thus causing harm to others."

Innocent bystanders may recover, under Indiana law, from persons who sell liquor to minors or drunks despite the fact that the minor or drunk may harm them by some negligent or unlawful act. *Elder* v. *Fisher*, —— Ind. ——, 217 N.E.2d 847 (1966).

In *Northern Indiana Transit, Inc.* v. *Burk*, 228 Ind. 162, 176, 177, 89 N.E.2d 905 (1949), the Indiana Supreme Court quoted the Restatement at page 177 as authority for holding that it matters not whether the intervening independent act was a negligent or criminal

act, as long as it was reasonably foreseeable. The Indiana Appellate Court has recently followed the *Burk* case. *New York Cent. R. R.* v. *Cavinder*, ___ Ind. App. ___, 211 N.E.2d 502 (1965).

3. The Majority Opinion of the Court of Appeals Conflicts With the Principle of a Decision of the Supreme Court of the United States.

The scope of a manufacturer's duty was recently decided by this Court in *Parks* v. *Simpson Timber Co.*, 288 U.S. 459, 87 S. Ct. 2115, 18 L. Ed.2d 1319 (1967).

In that case, on the defendant's petition for rehearing en banc, the full Ninth Circuit vacated its original decision and held 5 to 4 that a manufacturer was under no duty to discover and prevent the unknown dangers to which his packaging might expose handlers of his product. *Simpson Lumber Co.* v. *Parks*, 369 F.2d 324 (9th Cir. 1966). At page 333, the minority opinion reads as follows:

> "A manufacturer's duty to exercise care extends to 'risks which are created in the course of uses of the chattel which the manufacturer *should reasonably anticipate.*' Restatement (Second), Torts, § 395, comment j. A manufacturer must foresee and guard against a given risk if it is one '*which a reasonable manufacturer would anticipate as likely enough to be taken into account*'; and it is ordinarily 'a question for the jury whether the maker should have anticipated it.' Harper & James, supra § 28.6, p. 1546. See also 1 Frumer & Friedman, supra, §§ 8.03, 8.05; Noel, supra, 71 Yale L. J. at 856-85 (1962)."

This court reversed thereby reinstating a verdict in favor of the plaintiff after the jury had been instructed that the manufacturer's duty was to use "reasonable care."

4. The Majority Opinion of the Court of Appeals Confuses Duty With Contributory Negligence.

(A) THE CASE OF *CAMPO* v. *SCOFIELD* IS NEITHER APPLICABLE NOR CORRECT.

The majority opinion relied on cases such as *Campo* v. *Scofield,* 301 N.Y. 468, 95 N.E.2d 802 (1950), and *Kahn* v. *Chrysler Corporation,* 221 F. Supp. 677 (D.C.S.D. Tex. 1963), in support of its argument that the sole duty of an automobile manufacturer to the public is to exercise care in the design and construction of its automobiles so that they will be reasonably fit for their intended use and free of latent dangers. In *Campo,* the court was faced with a situation where a remote user put his hand in a machine used to shear off the tops of onions. The court held that there is no liability on the part of a manufacturer if a person using an obviously dangerous machine is aware of such a risk and is contributorily negligent in assuming it. The court in that case, as in many other cases, loosely translated the issues of contributory negligence and assumption of risk into "duty language." As petitioner in the case now before the court was an innocent bystander and had no control whatsoever over the respondent's product, it is perfectly ridiculous to even consider whether the danger was latent. The *Campo* case is, therefore, not relevant, and should not be con-

sidered because the court was thinking in terms of a careless, ignorant, or incompetent person injuring himself through misuse. In *Kahn,* a child rode his bicycle into a sharp and protruding fin on the rear of a Dodge automobile. Although the court used "duty language," the following quotation at page 679, to-wit:

> ". . . should not be required to anticipate all the possible ways in which a person may injure himself by falling against an automobile, nor should they have a duty to protect against such possible injuries."

indicates that the basis of the decision was contributory negligence. Cases like these are of no value where an innocent bystander is the plaintiff despite such loose language about "duty."

In criticizing the *Campo* case, and the decisions that have followed it, probably the most outstanding treatise on products liability, Frumer & Friedman, Products Liability, § 7.02, at page 114, reads as follows:

> "It is submitted that these cases are unsound insofar as they deny recovery, as a matter of law, irrespective of whether the plaintiff appreciated the danger. A peril or danger may be patent but still not appreciated. Moreover, a manufacturer should incur responsibility for foreseeable injuries caused by dangers which were appreciated but momentarily forgotten, at least where it is feasible to install a safety device to eliminate the danger. Such questions should be decided by a jury, not by the court."

The same authors, in § 6.04, at page 103, state:

> "There, of course, may be an issue as to whether the danger or defect is 'obvious.' But even if it is an 'obvious' defect, so that the manufacturer is not liable to the user, by reason of the user's failure to prove his affirmative case or the user's assumption of risk or contributory negligence, depending upon the approach taken by the court, the manufacturer may still be liable for foreseeable injuries to third persons."

(B) REASONABLE FORESEEABILITY IS TEST EVEN FOR USERS.

In discussing abnormal or unintended use, Frumer & Friedman in § 15.01, page 351, say:

> "As previously discussed, the manufacturer is not liable for injuries resulting from abnormal or unintended use of his product, *if* such use was not reasonably foreseeable. The issue is one of foreseeability, and misuse may be foreseeable."

In *Spruill* v. *Boyle-Midway, Inc.*, 308 F.2d 79 (4th Cir. 1962), the plaintiff's son died when he swallowed some furniture polish. The defendant, of course, contended that it did not manufacture furnish polish for the purpose of having it swallowed by children. The court settled the matter by stating at page 83:

> "Intended purpose is but a convenient adaptation of the basic test of (1) 'reasonable foreseeability' framed to more specifically fit the factual situations out of which arise questions of a manufacturer's liability for negligence . . . (He)

> (the manufacturer) must also be expected to anticipate the environment which is normal for the use of his product."

In *Lovejoy* v. *Minneapolis-Moline Power Implement Company,* 248 Minn. 319, 79 N.W.2d 688 (1956), the plaintiff was injured when the pulley on the power take-off disintegrated while he was driving a tractor downhill at a higher speed than that recommended by the manufacturer. Incidentally, the speed of the tractor was controlled by a variable speed governor of the "fly-ball" type, which regulates the amount of gasoline entering the engine so as to control its speed. Unfortunately, the governor was installed in such a manner that the tractor could be operated even though the governor had been removed. Naturally, the defendant contended that the plaintiff's operation of the tractor down a hill with the governor cut out was such an unusual, unexpected, and unanticipated act that the defendant was under no duty to guard against it. The trial court directed a verdict for the defendant, and the Appellate Court reversed stating:

> "Whether the speed involved here was such as should reasonably have been anticipated by defendant in designing and manufacturing the tractors are questions which should have been submitted to the jury."

(C) INNOCENT BYSTANDERS SHOULD BE PROTECTED.

In *Mitchell* v. *Miller, et al.,* 26 Conn. Supp. 142, 214 A.2d 694 (1965), a 1962 Buick which was manufactured by the defendant, General Motors Corporation, was parked upon the parking area of a country club overlooking the fairway of a golf course. The hydramatic gear shift mechanism slipped from a "Park" locking to a neural position thereby allowing the automobile to roll down and strike the plaintiff's decedent while he was playing golf upon the fairway. As in this case, the defendant demurred upon the basis that it owed no duty to an innocent bystander. In overruling the defendant's demurrer, the court stated:

> "A defective automobile manufactured as alleged in this complaint by the defendant, constitutes a road hazard upon the highway. See *Greely* v. *Cunningham,* 116 Conn. 515, 518. The likelihood of injury from its use exists not merely for the passengers therein, but for the pedestrian upon the highway. The public policy which protects the user and consumer should also protect the innocent bystander in the instant case. An innocent bystander, while playing golf, was killed by a car defectively manufactured insofar as the allegations of the complaint go by the defendant automobile corporation. There seems to be no sound public policy to bar trial upon the issues raised in the complaint."

In *Hills* v. *McGillvrey, et al.,* —— Ore. ——, 402 P.2d 722 (1965), an automobile parts supplier was

held liable for the wrongful death of a motorist who was killed when his automobile was struck from the rear by another because of brake failure due to the supplier's negligence in furnishing the wrong wheel bearing. Even though a mechanic negligently installed the wrong bearing, the court, in discussing duty, stated:

> "It was for the jury to decide whether or not harm to the public might be a foreseeable result of the conduct of Orchard Auto Parts. If it was reasonably foreseeable that some harm to the traveling public could result from the installation of the wrong part on an automobile, and if it was reasonably foreseeable that the mechanic might negligently install on an automobile, a part supplied him for such a purpose, then it would follow that there was a duty on the part of the supplier not to supply the mechanic the wrong part."

In *Connelly* v. *Hagi, et al.,* 24 Conn. Supp. 198, 188 A.2d 884 (1963), a gasoline station employee was permitted to recover against Chrysler Corporation for damages sustained when a defectively manufactured automobile jumped backwards and pinned him under the vehicle.

Innocent bystanders have recovered against the manufacturers of other defective chattels. In *Piercefield* v. *Remmington Arms Co.,* 375 Mich. 85, 133 N.W.2d 129 (1965), an innocent bystander was injured when the barrel of a shotgun being fired by another person exploded because of a defective shell which had been manufactured by the defendant. The court held that an innocent bystander should have a cause of

action against the manufacturer on the theory of breach of warranty as well as upon the theory of negligence and stated that "Michigan, for abundantly worthy reasons, has eliminated lack of privity as a defense to actions as at bar." In *Webb* v. *Zern, et al.,* 422 Pa. 424, 220 A.2d 853 (June 24, 1966), an innocent bystander was injured when a beer keg exploded. The Supreme Court of Pennsylvania held that the innocent bystander had a cause of action against the manufacturer of the beer keg, notwithstanding the absence of privity.

Elliott v. *General Motors Corporation,* 296 F.2d 125 (7 Cir. 1961), and *J. I. Case Co.* v. *Sandefur,* 245 Ind. 213, 197 N.E.2d 519 (1964), held that privity of contract was not essential under Indiana law to state a cause of action in negligence.

5. The Majority Opinion of the Court of Appeals Deprived Petitioner of His Constitutional Right to Trial by Jury.

Article 1, Section 12 of the Indiana Bill of Rights provides, in part, ". . . every man for injury done to him in his person, property, or reputation shall have remedy by due course of law," and Article 1, Section 20 provides, "In all civil cases, the right to trial by jury shall remain inviolate."

The Indiana courts have repeatedly held that because of the above constitutional right to trial by jury, "The law very zealously protects one against whom a motion for a directed verdict is addressed . . ." *Estes* v. *Anderson Oil Company,* 93 Ind. App. 365, 176 N.E. 560 (1931). In *Bradford* v. *Chism,* 134 Ind. App.

501, 186 N.E.2d 432 (1963), and *Coleman* v. *Mithick*, —— Ind. App. ——, 202 N.E.2d 577 (1964), the court interpreted the constitution as placing ". . . a heavy restraining hand upon the courts to deny the submission of a cause brought in good faith and based upon a situation involving far-reaching and serious consequences to the plaintiff."

The dismissal of the petitioner's complaint deprives him of the right to trial by jury just as a directed verdict. In the latter instance, at least the petitioner would have had an opportunity to introduce evidence in support of his claim.

6. The Possibility of Future Adequate Legislation Is Not Sufficient Reason to Deny Justice to Petitioner.

The majority opinion of the Court of Appeals quotes with approval the District Judge as saying in his memorandum opinion:

> "The problem of devising standards of safety for the manufacture of automobiles is a legislative problem."

Perhaps Congress should do more work in this field, however, the fact that neither Congress nor any of the state legislatures have made it a criminal offense to either sell automobiles capable of traveling 2 or 3 times the speed limit or to incite irresponsible persons to violate the speed laws by advertising should not cause an inference to be drawn that either Congress or any of the state legislatures believes that a person seriously injured as a proximate result of such wanton miscon-

duct should have no remedy against the original wrongdoer. Actually, the fact that no specific legislation has been enacted is an indication that our legislatures are confident that our courts can handle this problem by using the common law negligence rules which have worked well for years in Indiana, and Congress has recently indicated that it expects courts to discharge their duty and decide civil damage suits as they arise in that Section 108(c) of the National Traffic and Motor Vehicles Safety Act of 1966 (80 Stat. 718) states:

> "Compliance with any Federal motor vehicle safety standard issued under this title does not exempt any person from any liability under common law."

The suggestion that action should first be taken by legislation ignores the history of the common law and how it has grown.

CONCLUSION.

The Court of Appeals erred in its application of Indiana law by narrowing the manufacturer's duty to avoiding only hidden defects and latent or concealed dangers which is tantamount to saying there is no bystander protection.

This anomalous result can be avoided by following the Indiana law which spells out the established duty of reasonable care under the circumstances and then lets the jury decide whether the defendant breached this duty.

The Court's method of reasoning has changed a question of fact to one of law, and has deprived the petitioner of his constitutional right to a trial by jury.

Respectfully submitted,

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